SUPREME COURT, U. S.

FILED
MAY 17 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1320

STERLING CURTIS BOWMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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BRIEF OF RESPONDENT

OPINION BELOW

On October 23, 1973, the Supreme Court of Florida filed its opinion in Bowman v. State, Case No. 44,271. Petitioner Bowman filed a Petition for Rehearing which was denied on December 13, 1973; and, thus, the opinion previously filed on October 23, 1973, became final. The opinion sought to be reviewed herein is reported at 286 So. 2d 9 and is printed in Respondent's Appendix A.

JURISDICTION

Petitioner is attempting to invoke the jurisdiction of this Court pursuant to 28 U.S.CA § 1257, which, as applicable herein, provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

QUESTION PRESENTED

WHETHER THE JURISDICTION OF THIS COURT HAS BEEN PROPERLY INVOKED PURSUANT TO 28 U.S.C.A. SECTION 1257(3)?

ARGUMENT

Petitioner has attempted to invoke the jurisdiction of this Honorable Court pursuant to 28 U.S.C.A. Section 1257(3), supra. Respondent respectfully submits that the order of the Florida Supreme Court denying the petition for writ of certiorari (Respondent's Appendix A) is not such "final judgment or decree" rendered by the highest court of a state in which a decision could be had within the meaning of 28 U.S.C.A. Section 1257, supra. The only judgment or decision which the Florida Supreme Court rendered in this cause was the decision that the Florida Supreme Court lacked jurisdiction to determine the merits of the appeal. In determining that they had no jurisdiction, the Florida Supreme Court did not reach any federal question which might have been involved in the cause nor did it deny petitioner any federal right properly presented for review. Its decision was simply based on the valid non-federal ground that it lacked jurisdiction in the cause. Callendar et al. v. State, 181 So. 2d 529 (Fla. 1966).

It has been the uniform position of this Court to rely on the authority of the Florida Supreme Court to determine its jurisdiction and the jurisdiction of every other Florida court. Dresner et al v. Tallahassee, 375 U.S. 136, 11 L.Ed.2d 208, 84 S.Ct. 235 (1963), 378 U.S. 539, 12 L.Ed.2d 1018, 84 S.Ct. 1895 (1964) and Callendar et al v. Florida, 380 U.S. 519, 14 L.Ed.2d 265, 85 S.Ct. 1325 (1965), 383 U.S. 270, 15 L.Ed.2d 749, 86 S.Ct. 924 (1966). This is based on the longstanding rule respected by all courts when the jurisdiction of a sister court is involved.

> "As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat., § 709; Judicial Code, § 237. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision."

* * *

> "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. . . . " John v. Paullin, 231 U.S. 583 (1913) at page 585. See also: Wolfe v. North Carolina, 364 U.S. 177, 4 L.Ed.2d 1650, 80 S.Ct. 1482 (1960).

Accordingly, this Honorable Court is without jurisdiction of this cause, because petitioner is not seeking review of a "final judgment or decree" rendered by the highest court of a state in which a decision could be had, as required by 28 U.S.C.A. Section 1257.

CONCLUSION

For the reasons and authorities herein
ited and discussed, the petition for writ
f certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

PROOF OF SERVICE

This is to certify that three copies of the foregoing Brief of Respondent have been furnished petitioner's counsel, the Honorable J. Russell Hornsby, 311 North Rosalind Avenue, Orlando, Florida 32801, by U.S. Mail, this _____day of May, 1974.

ENOCH J. WHITNEY
Assistant
Attorney General

OF COUNSEL FOR
RESPONDENT

RESPONDENT'S APPENDIX A

REVISED ORDER

Supreme Court of Florida

JULY TERM, A. D. 1973

TUESDAY, OCTOBER 23, 1973

STERLING CURTIS BOWMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondant.

12/14/73

CASE NO. 44,271

DISTRICT COURT OF APPEAL, FIRST DISTRICT

S-171

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, C.J., ROBERTS, McCAIN and DEKLE, JJ., concur

ERVIN, J., dissents

ERVIN, J., dissenting:

I believe we should treat the petition for writ of certiorari as one sounding in habeas corpus and require a return from the state. Where a plea of nolo contendere is substituted for a plea of not guilty the record should show if it was voluntary. See Boykin vs. Alabama, 395 U.S. 238, 23 L.Ed2d 274, 89 S.Ct. 1709. If the State's return clearly shows the substituted plea was voluntary then the writ should be discharged. But if doubt exists an evidentiary hearing should be held.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.
By: [signature]
Deputy Clerk

Y
CC: Hon. Raymond E. Rhodes, Clerk
Clerk, Felony Court of Record
Hon. Uriel Blount, Jr., Judge

Hon. J. Russell Hornsby;
Hon. James Campbell
Hon. Enoch J. Whitney